

1 he can identify a document that's relevant to  
2 the case, and can explain where it's from, and  
3 its reliability, that has nothing to do with  
4 his testimony.

5 MR. KIM: Your Honor, I'm -

6 JUDGE SIPPEL: I've got to hear  
7 more from Mr. Kirk before I can -

8 MR. KIM: I'm probably confused,  
9 Your Honor. My understanding was that the  
10 procedure for experts in this case was to be  
11 that (a) issue a report, and then (b), submit  
12 their testimony in advance.

13 JUDGE SIPPEL: Yes.

14 MR. KIM: And this witness has  
15 done both of those things.

16 JUDGE SIPPEL: Yes.

17 MR. KIM: Neither of those things  
18 included this document. So, now this witness  
19 is attempting to go beyond the scope of both  
20 his report, and his written testimony on  
21 direct, not on cross, on direct. And that's  
22 why I'm curious as to what he's doing.

1 JUDGE SIPPEL: Well, no, I  
2 understand the curiosity, and we'll find out  
3 in just a minute. Go ahead.

4 MR. KIRK: Your Honor, this is a  
5 document that was produced late in the  
6 process, and it's being introduced for Mr.  
7 Gerbrandt to look at, compare the question  
8 that he asked in his survey, with the question  
9 MASN itself asked to determine -

10 MR. KIM: Again, Your Honor -

11 JUDGE SIPPEL: Well, wait a  
12 minute. To determine what? Let him finish,  
13 please.

14 MR. KIRK: To determine whether or  
15 not the Comcast witness, and the MASN folks  
16 asked the same types of questions when it  
17 comes to surveys.

18 JUDGE SIPPEL: All right. And we  
19 tried -- what was -- how come this has only  
20 been identified, and it hasn't been received  
21 yet?

22 MR. KIRK: Because, initially,

1 when we introduced -- when I had it identified  
 2 by Mr. Cuddihy, he didn't have any personal  
 3 knowledge with regard to, necessarily, what  
 4 was going on in the survey, and it didn't  
 5 relate directly to his testimony. Here, Mr.  
 6 Gerbrandt is testifying all about surveys, a  
 7 number of surveys that he's conducted, and I  
 8 think it's directly relevant to look at what  
 9 MASN itself has done with regard to surveys.

10 JUDGE SIPPEL: Do you intend to  
 11 have him answer questions with respect to the  
 12 substance of what's in here?

13 MR. KIRK: Not on the substance,  
 14 Your Honor. Just the format of the question,  
 15 whether or not it's phrased in the same way.

16 JUDGE SIPPEL: And you object to  
 17 that?

18 MR. KIM: I do, Your Honor,  
 19 because it should have been part of his  
 20 testimony. I mean, this is sandbagging. This  
 21 is now introducing as buttressing his  
 22 testimony a document that they never

1 identified as part of his testimony. That's  
2 why I object.

3 JUDGE SIPPEL: But if it's already  
4 been -- I mean, you -- it was already -- it  
5 was identified, I'm sorry, through a former  
6 witness.

7 MR. KIM: Yes, sir. It was  
8 identified, but it was never identified as  
9 part of this witness' testimony. Experts have  
10 to disclose all that stuff.

11 JUDGE SIPPEL: No, I understand  
12 what -- I know what their obligations are. I  
13 mean, I'm not -- I'm going a little bit beyond  
14 that, though. But you're using the word  
15 "sandbag", like you've been shot in the back  
16 at the pass while you were going through. I  
17 don't quite look at it that way. I think that  
18 you've been on significant notice about this,  
19 and that you might have suspected that hey,  
20 maybe we're going to see this again, because  
21 it was identified, and it was unable to get in  
22 because of the reasons that Mr. Kirk states.

1 Now, how are you harmed by that?

2 MR. KIM: Your Honor -

3 JUDGE SIPPEL: You know this  
4 document, right?

5 MR. KIM: Well, I'm familiar with  
6 the document, because I saw it, I think for  
7 the first time, me, personally -

8 JUDGE SIPPEL: Yes.

9 MR. KIM: -- when we tried to  
10 introduce it through Mr. Cuddihy.

11 JUDGE SIPPEL: Yes.

12 MR. KIM: But the harm is that is  
13 using it to bolster the analysis that he did  
14 earlier.

15 JUDGE SIPPEL: How do you know  
16 that? He said that he's -- he didn't -- Mr.  
17 Kirk didn't say that.

18 MR. KIM: Because I think -

19 JUDGE SIPPEL: He didn't say  
20 anything about bolstering this witness'  
21 testimony.

22 MR. KIM: I believe Mr. Kirk's

1 proffer was that he was going to read off a  
2 question from this survey that is similar to  
3 the question that he analyzed, therefore,  
4 bolstering his testimony about the propriety  
5 of that question. And we do take issue with  
6 the question that he asked. We think he asked  
7 the wrong question.

8 JUDGE SIPPEL: When did that  
9 happen, just now?

10 MR. KIM: Mr. Kirk proffered that  
11 he was going to be asking him whether a  
12 question in this survey -

13 JUDGE SIPPEL: Yes.

14 MR. KIM: -- was similar to the  
15 question that he analyzed.

16 JUDGE SIPPEL: MASN -

17 MR. KIM: And that is bolstering  
18 his -

19 JUDGE SIPPEL: The similarity  
20 between this and the MASN, I guess,  
21 methodology. Is that basically it?

22 MR. KIRK: Correct.

1 MR. KIM: Yes.

2 JUDGE SIPPEL: Well, so, what's  
3 the big surprise about that? It was your own  
4 witness that had -- you had first been  
5 examined on this.

6 MR. KIRK: And, Your Honor, our  
7 document production request specifically asked  
8 for surveys. This was not produced as part of  
9 the document production. It was produced  
10 late.

11 MR. KIM: The reason why -

12 JUDGE SIPPEL: How late was late?

13 MR. KIRK: I think within the last  
14 month it was produced. It wasn't until after  
15 the deposition process, when the survey issue  
16 came back up, that we -

17 JUDGE SIPPEL: So, this was not  
18 available when you deposed Mr. Gerbrandt as -

19 MR. KIRK: When we started the  
20 deposition process, this was not in our  
21 possession.

22 JUDGE SIPPEL: You didn't have it

1 when he was deposed. This witness was  
2 deposed.

3 MR. KIRK: That's correct.

4 JUDGE SIPPEL: You didn't have it.  
5 Who was sandbagged?

6 MR. KIM: Your Honor, the reason  
7 why they didn't have it was it's a North  
8 Carolina survey, and it was irrelevant to the  
9 issues in this case. That's why we didn't  
10 produce it. They didn't produce documents  
11 that were outside the disputed territories,  
12 neither did we. We made it very clear that we  
13 weren't producing these documents because of  
14 that reason. And they did have this document  
15 before he submitted his direct testimony in  
16 this case.

17 JUDGE SIPPEL: Yes, but not before  
18 he was deposed.

19 MR. KIM: No, but his direct  
20 testimony was after he was deposed.

21 MR. KIRK: Your Honor -

22 MR. KIM: Just note my objection.



1 I think I know where the Court is going. I'll  
2 just note my objection for the record.

3 JUDGE SIPPEL: Well, you're always  
4 ahead of me, Mr. Kim. I'm going to overrule  
5 the objection.

6 MR. KIM: Very well, Your Honor.

7 JUDGE SIPPEL: It's noted for the  
8 record. And let's proceed on this.

9 MR. KIRK: Okay.

10 JUDGE SIPPEL: You have to be  
11 limited, though, to what this -

12 MR. KIRK: Certainly, Your Honor.

13 JUDGE SIPPEL: According to your  
14 proffer.

15 BY MR. KIRK:

16 Q Mr. Gerbrandt, can you read  
17 Question 10 for me?

18 A Yes.

19 JUDGE SIPPEL: What page would  
20 that be on?

21 MR. KIRK: Page COM 100-3.

22 JUDGE SIPPEL: 100-3? Oh, I see.

1 Yes, gotcha. I have you. I'm with you. Yes,  
2 sir.

3 THE WITNESS: Okay. This says,  
4 "Question 10: What is your favorite Major  
5 League Baseball team?"

6 BY MR. KIRK:

7 Q Does that differ substantially  
8 from your survey question, "Which Major League  
9 Baseball team do you tend to follow the most?"

10 A Not in my opinion.

11 MR. KIRK: Your Honor, I move that  
12 Comcast Exhibit 100 be admitted into evidence.

13 JUDGE SIPPEL: And you're  
14 objecting?

15 MR. KIM: I'm objecting, Your  
16 Honor.

17 JUDGE SIPPEL: It's your own  
18 document, and you tried to get it in through  
19 your own witness.

20 MR. KIM: No, sir. No, sir.

21 JUDGE SIPPEL: No?

22 MR. KIM: He tried to get it in,

1 Your Honor.

2 MR. KIRK: I tried to get it in.

3 JUDGE SIPPEL: Oh, I'm sorry.

4 Through cross, on cross, is that -

5 MR. KIM: Yes, he tried to get it  
6 in.

7 JUDGE SIPPEL: All right.

8 MR. KIM: And we objected, and the  
9 Court sustained the objection. This is a  
10 document that they could have put on their  
11 exhibit list if they want to use it. They  
12 could have had their witness identify it, and  
13 put as part of his testimony. They did not.

14 JUDGE SIPPEL: I'm going to  
15 reserve my decision on its admissibility.

16 MR. KIM: Thank you, Your Honor.

17 JUDGE SIPPEL: For what purpose,  
18 if it does come in, for. It certainly will  
19 not be -- I can tell -- the weight already has  
20 been -- the weight has already gone down about  
21 X number of points, in my view, because they  
22 got the Atlanta Braves as being 20, then the

1 next team, New York Yankees, being 11. I  
 2 guess, I think I know where those questions  
 3 were asked, what part of the country. If you  
 4 asked that question in the Bronx, I think it  
 5 would look a little different. So, what it  
 6 means to -- my point being is, what this thing  
 7 means, I have no idea. But, fine. We're  
 8 going to reserve my decision on whether or not  
 9 it's going to come in as evidence. But it is  
 10 continuously marked, and I guess we're  
 11 finished with it as far as this witness goes.

12 MR. KIRK: This document, yes,  
 13 Your Honor.

14 JUDGE SIPPEL: Okay. Unless you  
 15 want to raise something anew, Mr. Kim.

16 MR. KIM: Yes, sir.

17 JUDGE SIPPEL: Okay. All set? Is  
 18 that it? Is he tendered?

19 MR. KIRK: One final question?

20 JUDGE SIPPEL: Yes, sir.

21 BY MR. KIRK:

22 Q That is, in your experience, what

1 is the relationship between fan interest and  
2 TV viewership?

3 MR. KIM: Objection, Your Honor.  
4 I'm probably missing it. Could you point me  
5 to where in his direct testimony he talks  
6 about this? I'm sure I missed it.

7 MR. KIRK: His entire report, Your  
8 Honor, is based on concerning the level of fan  
9 interest in the three areas, Roanoke-  
10 Lynchburg, Tri-Cities, and Harrisburg. And  
11 the purpose of determining fan interest in  
12 those areas is directly related to this case.  
13 It's self-evident why he's issuing his report.

14 MR. KIM: So, could you direct me  
15 to where it is in the report, the question  
16 you're asking? If it's self-evident, just  
17 point me to the area in the report, I mean,  
18 his testimony, and I'll withdraw my objection.

19 MR. KIRK: Paragraph 4. I was  
20 also retained regarding consumer demand for  
21 college sports programming. I was retained to  
22 determine the level of fan interest in the

1 Baltimore Orioles, and the Washington  
2 Nationals.

3 MR. KIM: So, you asked him a  
4 question about what he was retained to do? I  
5 don't object to that question.

6 MR. KIRK: I asked him the  
7 question that I asked, and you have an  
8 objection.

9 MR. KIM: I do. You're pointing -  
10 - Your Honor, this is not part of his direct  
11 testimony. I object.

12 JUDGE SIPPEL: What -- let me --  
13 I'm going to -- what paragraph are you  
14 referring to, 4?

15 MR. KIRK: Paragraph 4.

16 JUDGE SIPPEL: And what does it  
17 say?

18 MR. KIRK: "I'm retained by  
19 Comcast to determine the level of fan interest  
20 in the Baltimore Orioles and the Washington  
21 Nationals baseball games, MASN's core  
22 programming, clearly linking it to television

1 in the following areas, Harrisburg,  
2 Pennsylvania; Roanoke-Lynchburg, Virginia, and  
3 the Tri-Cities area of Virginia. I was also  
4 retained to evaluate consumer demand for  
5 college sports programming, MASN's secondary  
6 programming, in those areas." So, I'm not  
7 sure where the -

8 MR. KIM: The objection is, Your  
9 Honor, he didn't ask him a question about what  
10 he was retained to do. He asked him a  
11 question about linking interest to viewership.  
12 That answer appears nowhere in his direct  
13 testimony that I can see, unless I'm missing  
14 it. So, he's asking him something that's  
15 beyond the scope of what he, again, as an  
16 expert, has submitted as his testimony.

17 MR. KIRK: And, Your Honor, if you  
18 look at Paragraph 11, for example -

19 JUDGE SIPPEL: Okay.

20 MR. KIRK: -- "The data derived  
21 from three separate sources all support my  
22 conclusion regarding the low consumer appeal

1 for Orioles and Nationals programming" -

2 MR. KIM: He could read that -

3 MR. KIRK: -- "in the Harrisburg  
4 area, enhanced the accuracy of my conclusion."

5 MR. KIM: Your Honor, he can ask  
6 the witness to read that statement into the  
7 record. I'll have no objection. He asked a  
8 different question.

9 JUDGE SIPPEL: You're saying  
10 there's no -- the level of fan interest  
11 (Reading.) Core programming. Well -

12 MR. KIM: Your Honor, I will also  
13 proffer for the Court that this is something  
14 that I will be going into in cross  
15 examination, but this is not part of his  
16 direct testimony.

17 JUDGE SIPPEL: Well, I agree with  
18 your literal interpretation of it, but it's  
19 hard to see where there isn't a fairly obvious  
20 connection between fan interest and TV  
21 viewership in a cable case.

22 MR. KIM: You know what, Judge?



1 JUDGE SIPPEL: Yes?

2 MR. KIM: You know what, Judge,

3 that point is something that I think I can

4 make through the witness on cross examination.

5 And what you just said is, I think, contrary

6 to what this witness will testify. That's why

7 I think it's a proper subject for cross

8 examination. It's not contained within his

9 direct examination, and I object to it on that

10 basis.

11 JUDGE SIPPEL: And what is it you

12 are objecting to, the question?

13 MR. KIM: Yes, sir. Because the

14 question is calling for an answer that is

15 outside the scope of his direct testimony.

16 JUDGE SIPPEL: Mr. Kirk, is there

17 anything you can shed on it without -- do we

18 have to excuse the witness? Let's excuse the

19 witness. Would you step outside for just a

20 minute, sir?

21 Okay. Now, what am I missing

22 here? What's -

1                   MR. KIM: I'd like to make a  
2 proffer to the Court.

3                   JUDGE SIPPEL: No, wait a minute.  
4 Let's see if Mr. Kirk can shed some light on  
5 this. Mr. Kirk, is there something amiss here  
6 that I'm not getting?

7                   MR. KIRK: No, Your Honor. We've  
8 got a 17-page, 15, 12-page expert report that  
9 goes through analyzing multiple surveys to  
10 express fan interest, multiple surveys that  
11 the expert says indicate whether there's  
12 consumer demand for the programming. And I'm  
13 asking the general question that's  
14 encapsulated in the entire report, what does  
15 he feel is the relationship between fan  
16 interest and TV viewership, the programming.

17                   MR. KIM: And that is the step  
18 that he never took in his report, and that he  
19 never took in his direct testimony. And, Your  
20 Honor, I would proffer to you that I'll be  
21 asking the questions about that very issue -

22                   JUDGE SIPPEL: Yes.

1 MR. KIM: -- because when I  
2 deposed him, and I asked him what the  
3 connection was between the surveys that he did  
4 to measure interest -

5 JUDGE SIPPEL: Right. And  
6 viewership.

7 MR. KIM: -- and viewership.

8 JUDGE SIPPEL: Yes.

9 MR. KIM: He said he had no idea.  
10 And that's why I object to him trying to get  
11 that in on his direct, when that was not part  
12 of his testimony. That is the relevant issue.  
13 And his testimony will be, unless he changes  
14 it now, that he has no idea what the  
15 connection between those two things are. And  
16 if you wanted to change that testimony, or --  
17 it should have been in his direct testimony.

18 JUDGE SIPPEL: Well, it's been a  
19 while before I was ever sitting in your chair,  
20 but it seems to me that if you get a witness  
21 testify two different ways, you accomplish  
22 quite a bit.

1 MR. KIM: Well, Your Honor -

2 JUDGE SIPPEL: You want to do  
3 that.

4 MR. KIM: I don't know which way  
5 he's going to go today, but I can tell you  
6 what I have on the record. And I'm prepared  
7 to impeach the witness, if I need to do that.  
8 But that's why I object to that question.  
9 It's not in his direct testimony. I wasn't  
10 prepared for that question coming out on  
11 direct. I believe it's a proper subject for  
12 cross.

13 JUDGE SIPPEL: All right. Well,  
14 it's also going to be a proper subject for  
15 redirect.

16 MR. KIRK: If he's going to get  
17 into it on cross, I'll address it on redirect,  
18 Your Honor.

19 JUDGE SIPPEL: We'll wait until  
20 the end of the movie to see how it comes out.  
21 Okay?

22 MR. KIM: Has a happy ending.

1 JUDGE SIPPEL: We'll see.

2 MR. KIM: Or some side has a happy  
3 ending.

4 JUDGE SIPPEL: We'll see.

5 MR. KIRK: I'll grab the witness,  
6 Your Honor?

7 JUDGE SIPPEL: Please do. Go easy  
8 with him. While we're waiting here, I have an  
9 administrative, I guess you'd call it an  
10 administrative matter I should take care of,  
11 and that is that I noticed that Mr. Schonman  
12 is absent today. Ms. Mumaw is here, and that  
13 you have -- you've got somebody associated  
14 with you here.

15 MS. MUMAW: I do, Your Honor.  
16 Diana Sokolow, as part of the -

17 JUDGE SIPPEL: Well, good  
18 afternoon, ma'am.

19 MS. SOKOLOW: Good afternoon.

20 JUDGE SIPPEL: All right. Welcome  
21 to this proceeding, and I hope you learn  
22 something. Good. Welcome. All right. Let's

1 go, when we get a witness. He'll be right  
2 back, I'm sure.

3 (Off the record comments.)

4 JUDGE SIPPEL: All right. Let's  
5 go back on the record. We were just doing  
6 what lawyers do in this cases, you know.  
7 Sorry to inconvenience you, but we're on our  
8 way. By the way, the ruling was that you're  
9 not going to be allowed to answer that  
10 question that Mr. Kirk asked you, but you will  
11 be -- but we will come back to it again,  
12 probably on redirect, maybe even before that.  
13 So, it's not abandoned, but right now it has  
14 been objected to by Mr. Kim. So, fan  
15 interest, you've got that, but TV viewership,  
16 that hasn't been established yet. Okay.  
17 Let's go.

18 MR. KIRK: Your Honor, we tender  
19 Mr. Gerbrandt for cross examination.

20 JUDGE SIPPEL: Thank you.

21 MR. KIM: May I proceed, Your  
22 Honor?

1 JUDGE SIPPEL: You may, Mr. Kim.

2 MR. KIM: Thank you, Your Honor.

3 Good afternoon, Mr. Gerbrandt.

4 THE WITNESS: Good afternoon.

5 MR. KIM: It's good to see you  
6 again.

7 CROSS EXAMINATION

8 BY MR. KIM:

9 Q You're here today giving an expert  
10 opinion regarding consumer demand for  
11 programming. Is that right?

12 A At the core, it's trying to -- it  
13 was to measure through a variety of different  
14 ways fan interest specifically in the Orioles,  
15 the Nationals, and then the NCAA college  
16 basketball teams carried by MASN in  
17 Southwestern Virginia. The former two were in  
18 both Harrisburg, Virginia, as well as  
19 Southwestern Virginia. So, it was, at its  
20 core, was to measure fan interest in that kind  
21 of programming.

22 Q Are you here giving an expert

1 opinion about consumer demand for certain  
2 sports teams?

3 A Consumer demand is -- it relates  
4 to their interest in those teams. And,  
5 ultimately, fan interest always serves as sort  
6 of the basic gating question for any kind of  
7 interest -- fans, fundamentally -

8 Q Okay, Mr. Gerbrandt -

9 A -- serve as -

10 Q Mr. Gerbrandt -

11 A I'm sorry. Can I -

12 Q No. Can you answer my question?

13 JUDGE SIPPEL: Well, I'm going to  
14 let him finish the question this time, but be  
15 careful that you don't go beyond what you're  
16 being asked.

17 THE WITNESS: Sure.

18 JUDGE SIPPEL: But go ahead, sir.

19 THE WITNESS: Sure. Fans serve as  
20 the pool from which ultimately potential  
21 viewers are drawn, so you start with people  
22 who are interested in a particular subject



1 matter. Ultimately, that's the group from  
2 which viewership ultimately is derived.

3 JUDGE SIPPEL: Okay. I'm sorry.  
4 That went further than you wanted. Go ahead.  
5 See what you can do.

6 BY MR. KIM:

7 Q Mr. Gerbrandt -

8 JUDGE SIPPEL: I will tell -- what  
9 was your question?

10 MR. KIM: I'm going to give it  
11 again, Your Honor.

12 BY MR. KIM:

13 Q Mr. Gerbrandt, are you here today  
14 giving an expert opinion about fan interest in  
15 certain types of sports teams?

16 JUDGE SIPPEL: Yes or no?

17 THE WITNESS: Yes.

18 JUDGE SIPPEL: All right. I'm  
19 going to strike the rest of -- his previous  
20 answer, I'm going to strike it.

21 MR. KIM: Thank you, Your Honor.

22 BY MR. KIM: